

1 CHRISTOPHER L. FROST (SBN 200336)

chris@frostllp.com

2 JOHN MAATTA (SBN 83683)

john@frostllp.com

3 JOSHUA S. STAMBAUGH (SBN 233834)

josh@frostllp.com

4 FROST LLP

10960 Wilshire Blvd., Suite 1260

5 Los Angeles, California 90024

Telephone: (424) 254-0441

6 SHAUNA IZADI (ADMITTED via *Pro Hac Vice*)

sizadi@izadilegal.com

7 IZADI LEGAL GROUP, PLLC

8 Attorneys for Defendants,

9 Synta Technology Corp. of Taiwan;

Suzhou Synta Optical Technology Co.;

10 Nantong Schmidt Opt-Electrical Technology Co. Ltd.;

Synta Canada International Enterprises Ltd.;

11 Pacific Telescope Corp.; Olivon Manufacturing Co. Ltd.;

SW Technology Corp.; Celestron Acquisition, LLC;

12 Olivon USA LLC; David Shen; Joseph Lupica; and

David Anderson

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

15 IN RE: TELESCOPE ANTITRUST
LITIGATION

Case No. 5:20-cv-03642-EJD

16
17 This document relates to

18 SPECTRUM SCIENTIFICS LLC, RADIO
19 CITY, INC., and those similarly situated,

20 Plaintiff,

21 vs.

22 CELESTRON ACQUISITION, LLC, SYNTA
CANADA INT'L ENTERPRISES LTD.,
23 SKYWATCHER USA, SKY-WATCHER
CANADA, SW TECHNOLOGY CORP.,
24 OLIVON MANUFACTURING CO. LTD.,
OLIVON USA, LLC, COREY LEE, SYLVIA
25 SHEN, JEAN SHEN, JOSEPH LUPICA,
DAVE ANDERSON, LAURENCE HUEN,
26 and DOES 1-50,

27 Defendants.

**DEFENDANTS' APPLICATION AND
MEMORANDUM IN SUPPORT OF
ATTORNEYS' FEES AND COSTS
PURSUANT TO ORDER RE:
DEFENDANTS' MOTION FOR
TERMINATING SANCTIONS [ECF 486]**

*[Declarations of Christopher Frost and
Shuana Izadi; and [Proposed] Order
Concurrently Filed Herewith]*

Judge: Hon. Edward J. Davila

Date: TBD

Time TBD

Ctrm DBD

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1 Defendants respectfully submit this application for attorneys' fees and costs, and the
2 accompanying memorandum of points and authorities pursuant to the Court's August 25, 2023
3 Order granting in part Defendants' motion for terminating sanctions against direct purchaser
4 plaintiffs ("DPPs"). [Dkt. 486]. As explicitly held by this Court: "[A]ttorneys' fees arising from the
5 preparation and litigation of this motion are appropriate based on [Radio City and BraunHagey &
6 Borden's discovery] misconduct, as well as to deter future misconduct and restore Defendants to
7 the position they would have been in had Plaintiff faithfully fulfilled its discovery obligations."
8 [Dkt. 486 at p. 13-14].

9 **I. INTRODUCTION**

10 After nearly three years into this litigation, the Court disqualified Radio City as the DPP
11 class representative by granting, in part, Defendants' motion for terminating sanctions. The Court
12 found that Radio City and its counsel, BraunHagey & Borden, LLP ("BHB"), engaged in egregious
13 and inexcusable discovery misconduct. The Court took Radio City and its counsel to task for their
14 destruction of evidence, failure to follow the discovery rules, and otherwise vexatious conduct.
15 Indeed, the Court held that Radio City and BHB "acted willfully, with fault, and/or in bad faith by
16 consciously disregarding its obligations to preserve relevant evidence during the course of
17 litigation," and thereby disqualified Radio City as a class representative. (Dkt. 486 at 8). The Court
18 rightfully found BHB's conduct "troubling," "inexcusable," "disturbing" and "disappointing." (Dkt.
19 486 at 8, 9 & 20.)

20 Therefore, Defendants appropriately seek reimbursement of their attorneys' fees, costs and
21 expenses from Radio City and BHB, jointly and severally, pursuant to this Court's Order, and under
22 the Court's inherent authority to impose such sanctions. From the onset, Radio City's case was
23 litigated in the most contentious fashion, and every discovery issue was a battle. For at least a year
24 *prior* to the February 1, 2023 Maline Fish deposition, BHB repeatedly represented to Defendants
25 and the Court that they produced "everything," and were in full compliance with their preservation
26 and production obligations. Fortunately, Defendants uncovered the spoliation, and Radio City's
27 deceptive "house of cards" came tumbling down. Unfortunately, however, this discovery came at
28

1 substantial and extremely prejudicial expense to the Defendants, who have incurred millions of
2 dollars defending the DPPs action, seeking discovery from Radio City, battling DPPs' counsel in
3 discovery disputes regarding Radio City, preparing for and taking Radio City's deposition, and of
4 course preparing and arguing the motion to terminate Radio City as a class representative. As such,
5 Defendants seek monetary sanctions in the amount of \$311,714.50, all of which was caused directly
6 by Radio City's and BHB's willful and bad faith discovery misconduct. As the Court has already
7 held, Defendants are entitled to these monetary sanctions in order to compensate Defendants, ensure
8 justice is served, punish the spoliating perpetrators and deter further misconduct.

9 Due to the egregious misconduct and intentional malfeasance perpetrated by Radio City and
10 its counsel, Defendants endured three relentless years of litigation against a fictitious and artificially
11 constructed party, hemorrhaging millions of dollars in legal fees. Throughout this ordeal, Radio
12 City obstinately resisted the truth and strategically misled, obfuscated, and attempted to disorient
13 the Defendants at every conceivable juncture.

14 Radio City and its counsel continued to pursue its objectively frivolous case up until the
15 bitter end by attempting to defend its intentional spoliation before this Court and refusing to
16 voluntarily withdraw Radio City as a class representative. They did so in a deliberately vexatious
17 manner that significantly and unnecessarily multiplied the costs of defense. Radio City and its
18 counsel executed a strategy to avert the discovery of the spoliation by any conceivable means, and
19 to burden Defendants with frivolous discovery disputes. Among other things, BHB:

- 20 • Recruited Radio City as a party by cold-calling Maline Fish as a potential class
21 representative who purchased telescopes from Celestron (Dkt. 322-2 at p. 30:13 – 33:19);
- 22 • Repeatedly assured Defendants and this Court that Radio City was in full compliance with
23 its preservation and discovery obligations, and repeatedly represented that all documents had
24 been collected and produced (Dkt. 486 at p. 3-4;);
- 25 • Ignored their duties under the Court's Orders and the Federal Rules of Civil Procedure by
26 failing to turn over all files and records in their possession, custody or control concerning
27 the monthly sales reports, open invoice reports, inventory reports, used sales reports, and
28

1 register reports, which were subject to multiple written discovery requests;

- 2 • Represented to Defendants that Radio City would be removed as class representative, but
- 3 then later refused, and then later attempted to legitimize their discovery misconduct and
- 4 intentional spoliation (Dkt. 341);
- 5 • Advanced patently frivolous legal arguments in opposition to Defendants' motion for
- 6 terminating sanctions by claiming that the destroyed documents were redundant and were
- 7 destroyed in the ordinary course of business even though they were destroyed more than two
- 8 years after the initiation of this litigation and four years after Radio City closed its storefront.
- 9 (Dkt. 320: 2, Dkt. 286 at p. 4; Dkt. 341 at p. 5, Dkt. 341-3);
- 10 • Even as of late as August 24, 2023, prior to the entry of the Order, BHB not only refused to
- 11 voluntarily scan and produce two **additional** boxes of documents obtained from Radio City,
- 12 but also categorically refused to identify what document requests the two boxes of
- 13 documents were responsive to (Izadi Decl. at ¶9);

14 As the record clearly reflects, Radio City and BHB actively concealed the existence of

15 thousands of documents and destroyed other key documents while litigation was pending.

16 Defendants suffered prejudice due to Radio City and BHB's conduct, and such discovery abuse is

17 not in isolation, and has continued up through the entry of the Order on Defendants' motion for

18 sanctions. Amidst Radio City and BHBs spoliation of evidence, DPPs restart of the clock with new

19 representatives at the eleventh hour, has unduly prejudiced Defendants, who have incurred

20 significant legal fees in discovery and discovery disputes with Radio City over these past three years.

21 As set forth herein, not only did Radio City and BHB engage in bad faith and intentional

22 misconduct that violates the Federal Rules of Civil Procedure, Radio City and BHB actively

23 concealed their misconduct and repeatedly rebuffed Defendants' discovery efforts to investigate at

24 every single turn since at least early 2021 in order to avoid detection. Radio City and BHB's

25 attempts to thwart Defendants' investigation was continuous and deliberate with multiple

26 affirmative representations to not only the Defendants' counsel, but also to this Court. Radio City's

27 and BHB's recalcitrance caused Defendants to bring their motion for terminating sanctions.

Consequently, Radio City and BHB should bear the burden of their own doings. Thus, Defendants should be awarded all their attorneys' fees that flow and relate to their continuous chase for the truth, which was finally uncovered through the testimony of Maline Fish.

The Court found BHB's conduct "troubling," "inexcusable," "disturbing" and "disappointing." (Dkt. 486 at 8, 9 & 20.) Therefore, Defendants respectfully request \$311,714.50 in attorney's fees. Such an award is not only required to make Defendants whole but a necessary step to uphold the sanctity of the legal system, caution potential violators, and ensure that the judiciary remains a realm of justice and not a playground for deception.

II. FACTUAL BACKGROUND

The basis of this motion is set forth in this Court's Order and opinion dated August 25, 2023, granting in part, and denying in part, Defendants' motion for terminating sanctions, disqualifying Radio City from this case, and explaining in detail BHB's discovery misconduct. [Dkt. 486]. For the sake of judicial efficiency, Defendants hereby incorporate the Court's Order, as well as Defendants' previous filings reflecting the lack of candor displayed by Radio City and BHB during the course of discovery, set forth below:

- 01/06/202 - Joint Discovery Letter re DPP customer lists [Dkt. 294]
- 01/13/2023 - Discovery Order re 394 January 6, 2023 Discovery Dispute [Dkt. 296]
- 01/17/2023 - Joint Discovery Letter re DPP discovery collection efforts [Dkt. 298]
- 01/20/2023 - Joint Discovery Letter re deposition of Radio City [Dkt. 305]
- 02/01/2023 - Discovery Order re 298 and 305 Discovery Dispute [Dkt. 314]
- 02/12/2023 - Defendants' motion for terminating sanctions [Dkt. 322] and reply brief [Dkt. 349]
- 02/17/2023 – Defendants' Motion for an Order: (1) for Turnover of Sales, Used Sales, Inventory, Invoice, and Register Reports; and (2) Setting Order to Show Cause Re Sanctions for Misrepresentations to the Court and Violation of Court Order [Dkt. 325]
- 03/21/2023 - Joint Discovery Letter Brief re Deposition Dates for DPPs' Expert Christopher Groves [Dkt. 364]

- 03/22/2023 - Discovery Order re 364 March 21, 2023 Discovery Dispute [Dkt. 366]
- 03/27/2023 - Defendants’ Motion to Strike DPPS’ Opposition and Groves Declaration [Dkt. 372];

Defendants’ motion for terminating sanctions and motion for turnover order both provide a detailed glimpse into the charade of unquestionable concealment and destruction of discovery committed by Radio City and its counsel and the underhanded litigation tactics employed by Radio City and BHB, time and again, in affirmatively concealing and disregarding their obligations to preserve relevant evidence during the course of litigation.

In granting the Defendants’ motion for sanctions, the Court held that Radio City and BHB “acted willfully, with fault and/or in bad faith” by consciously failing to preserve and timely produce information. (Dkt. 486 at 8.) Here, the discovery abuses committed by Radio City and BHB are not mere gamesmanship or “garden variety” of discovery abuses. Rather, their conduct was so egregious that the Court finds that Radio City has forfeited its right to proceed in court.¹

III. ARGUMENT

A. Radio City’s Opposition to Defendants’ Motion for Terminating Sanctions Exemplifies It’s Bad Faith, and It’s Counsel’s Bad Faith, Through Their Refusal to Conduct Discovery in Good Faith

The capstone to Radio City’s spoliation conduct was its resistance to stepping down as class representative and its opposition to Defendants’ motion for terminating sanctions. Radio City failed to offer a single non-frivolous argument in favor of maintaining Radio City as a class representative. Instead, it resorted to ignoring controlling precedent and misstating the facts and the law. Among other things, Radio City and its counsel brazenly asserted that:

- The destruction was “harmless” because Defendants “have not been deprived of any material documents.” [Dkt. 341 at 12; Dkt 486 at p. 11];

¹ DPP Counsel’s was disqualified in a prior matter based on similar misconduct in this very district. See *Gotham City Online, LLC v. Art.com, Inc.*, (N.D. Cal. Case No. C14-00991JSW). Other litigants in the case of *Jennifer Marino v. YummyEarth Inc.*, (N.D. Cal. Case No. 3:22-cv-02739) have noted DPP Counsel’s history of raising “phantom sanctions issues” as part of their “scorched-earth practice.”

- 1 • Radio City “only” got “rid of” key documents as opposed to intentionally destroying them,
- 2 which plaintiffs claimed was done in the normal course of business (despite the fact that
- 3 litigation had been ongoing for years at the time of spoliation) [Dkt. 341 at 9];
- 4 • The “complete” underlying data that was destroyed had purportedly been provided in the
- 5 past. [Dkt. 341] However, their assertions crumbled under scrutiny, as decisively refuted by
- 6 the declarations of W. Cai and S. Izadi. [Dkt. 349];
- 7 • Its refusal to comply with the Court’s Order was justified because its expert wanted to attend
- 8 a conference rather than comply with a Court Order (4/6/23 Hrg Trans. at p.43, attached to
- 9 Izadi Decl. as B);
- 10 • The destroyed evidence had no bearing on the issues in this case [Dkt 341]; and
- 11 • Referencing hundreds of random Bates numbers to create a false appearance that Radio City
- 12 produced more substantive data than they did [Dkt. 341, 385].

13 The cumulative weight of Radio City’s actions and arguments, saturated in bad faith,

14 illuminates the necessity for the Court to recognize the depth of their misconduct and mete out

15 commensurate sanctions.

16 **B. Defendants are Entitled to Their Fees Incurred as Result of the Multiple**

17 **Discovery Disputes Arising Out of Radio City’s Concealment of Documents**

18 **and Spoliation of Documents**

19 The charade that Radio City maintained for three years is quite extraordinary. BHB and

20 Radio City gaslighted Defendants since 2021, making affirmative representations as to their

21 compliance with Defendants’ multiple discovery requests.

22 In their January 6, 2023 insert into the Joint Letter Brief re: production of customer

23 information, [Dkt. 294], Radio City, by and through BHB, stated and represented to Defendants

24 and this Court, the following:

- 25 • “The matter actually before the Court—objections served by DPPs two years ago in
- 26 December 2020—is academic, because (as DPPs have advised Defendants) *DPPs have*
- 27 *produced all documents that would contain relevant customer information in response to*

1 *other of Defendants’ numerous and overlapping RFPs*, and identified them by bates
 2 number.” [Dkt 294 at fn 1, p. 4] (emphasis added);

- 3 • “*DPPs have told Defendants that all relevant, responsive, non-privileged hardcopy*
 4 *transactional documents in Radio City’s possession have been produced* (without regard
 5 to search terms); that all of Radio City’s functioning devices have had the search terms
 6 agreed by the parties run upon them; and that all non-privileged ESI that hit upon the search
 7 terms agreed by the parties has been produced. *DPPs have also confirmed that there are no*
 8 *additional responsive documents that do not hit upon the search terms of which Radio*
 9 *City is aware, and that there are no sources of likely responsive documents of which Radio*
 10 *City is aware other than the hardcopy documents (which have been produced)* and its ESI
 11 (which has been produced via the search terms agreed by the parties pursuant to Court
 12 ordered stipulation)” [Dkt. 294 at p. 5] (emphasis added);
- 13 • “*This information has already been provided to Defendants.*” [Dkt. 294 at p. 5] (emphasis
 14 added);
- 15 • “In sum, *Radio City has complied with its discovery obligations*, and the motion should be
 16 denied” [Dkt. 294 at p. 5] (emphasis added);
- 17 • “On September 24, 2021 (i.e., more than a year ago), DPPs produced 48,483 pages of sales
 18 invoices and purchase orders. *These materials represent the relevant transactional data in*
 19 *Radio City’s possession, custody, and control.*” [Dkt. 294 at p. 5] (emphasis added); and
- 20 • “DPPs *searched all available ESI custodians and locations.*” [Dkt. 294 at fn 6 at p. 7]
 21 (emphasis added)

22 The Court, taking BHB and Radio City’s representations as true, set forth in its Order on the
 23 Discovery Dispute Dkt. 294:

- 24 • “DPPs appear to have withdrawn their objections, and now say that they have produced ‘all
 25 relevant, responsive, non-privileged hardcopy transactional documents in plaintiff Radio
 26 City’s possession’ (without regard to search terms). . . .”
- 27 • “DPPs say that ‘there are no additional responsive documents that do not hit upon the search
 28

1 terms of which Radio City is aware,’ and that there are no other sources of likely responsive
2 documents that have already been searched as described.” [Dkt. No. 296.]

3 On January 31, 2023, this Court held a further hearing on related concerns raised by
4 Defendants concerning Radio City’s refusal to search its electronic data and devices. (Dkt. No.
5 314). During the January 31, 2023 hearing, DPP Plaintiffs’ counsel represented to the Court the
6 following:

- 7 • “I think we produced everything.” [Dkt. 325-25 at 6:6.];
- 8 • “We ran the search terms, the search – we produced everything that hit from that.” [Dkt.
9 325-25 at 11:22-23.]; and
- 10 • “I’m just tell you (sic), to the best of my understanding, knowledge, and everything else,
11 that we did it the right way.” [Dkt. 325-25 at 21:6-8.]

12 Moreover, in the Joint Discovery Briefs (Dkt. Nos. 298 and 305) that precipitated the January
13 31 hearing, DPP Plaintiffs represented to the Defendants and to this Court the following:

- 14 • “Radio City has produced all of its hardcopy purchase orders and invoices in its
15 possession as they were maintained, which include customer information.” [Dkt. No.
16 296 at pg. 1.];
- 17 • “Instead, Defendants assert that they ‘want confirmation that all customer-identifying
18 data has been produced, and what steps were taken to ensure the veracity and
19 completeness of that production’—but this information has already been provided to
20 Defendants.” [Dkt. No. 296 at pg. 5 (emph. added).];
- 21 • “DPPs have told Defendants that all relevant, responsive, non-privileged hardcopy
22 transactional documents in Radio City’s possession have been produced (without regard
23 to search terms).” [*Id.*];
- 24 • “DPPs have also confirmed that there are no additional responsive documents that do not
25 hit upon the search terms of which Radio City is aware, and that there are no sources of
26 likely responsive documents of which Radio City is aware other than the hardcopy
27 documents (which have been produced) and its ESI (which has been produced via the
28

search terms agreed by the parties pursuant to Court ordered stipulation).” [*Id.* (emph. added).]; and

- “On September 24, 2021 (i.e., more than a year ago), DPPs produced 48,483 pages of sales invoices and purchase orders. These materials represent the relevant transactional data in Radio City’s possession, custody, and control.” [*Id.*]

The January 31 hearing resulted in a February 1 discovery order by this Court. [Dkt. No. 314.]

Both of the foregoing Orders follow the Court’s Order of two years ago, dated February 19, 2021. More specifically, the February 19, 2021 Order Regarding the Production of ESI and Hardcopy Documents provides, in part:

D. Hard Copy Document Storage: During the pendency of this litigation, the parties shall make reasonable efforts **to preserve the originals of all hard copy documents** as to which there may be issues of legibility of all or any part of the production copy. Each party reserves the right to request to inspect such original documents of the opposing party or parties, which request shall not be unreasonably denied. [ECF No. 122, emph. added.]

The above discovery disputes arose solely as a result of Radio City and BHB’s misconduct, for which Defendants incurred substantial attorneys’ fees and wasted hundreds of hours as a result thereof.

C. Deposition Expenses and Costs Incurred by Defendants

Defendants seek payment from BHB and Radio City for the expenses and costs associated with the deposition of Maline Fish, which took place in Minneapolis, Minnesota on February 1, 2023 wherein it was finally revealed that after years of litigation that Radio City had destroyed key evidence months before her deposition. It was through this very deposition that Defendants were finally able to establish that Radio City had failed to produce responsive information during discovery. These de[po]sition fees amount to \$48,638.50 (See Declarations of Frost and Izadi)

**IV. FEES WARRANTED AS A RESULT OF BHB’S RECRUITMENT OF, AND
CONTENTIOUS PROSECUTION OF CLAIMS ON BEHALF OF, RADIO CITY**

BHB’s filing of the lawsuit on behalf of Radio City demonstrates bad faith because BHB

1 knowingly recruited Radio City who had no basis for believing that Defendants violated any laws.
 2 (Dkt. 322-2 at p. 30:13 – 33:19 [Athul, an attorney from BHB cold called Maline Fish about serving
 3 as class representative because she was a Celestron dealer]).

4 Courts have found conduct sanctionable under § 1927 where an attorney “educates”
 5 plaintiffs as to their causes of action. See *U.S. v. ITT Educational Services, Inc.*, No. 1:07–cv–0867–
 6 TWP–MJD, 2012 WL 1028794, at *11 (S.D. Ind., 2012) (awarding attorneys’ fees and sanctions
 7 where Relator “had no idea that ITT may have violated the FCA or that she may have had a plausible
 8 lawsuit against her former employer until she was approached and ‘educated’ by [counsel].
 9 Common sense suggests that [Relator] is worlds apart from the type of genuine whistleblower
 10 contemplated by the FCA.”); see also *U.S. v. Corinthian College, Inc.*, 2:07-cv-01984 (C.D. Cal.,
 11 June 6, 2013) (finding counsel “pursued the case in bad faith because he manufactured this case by
 12 knowingly recruiting Relators who he knew lacked the requisite knowledge of the conduct at issue.”)

13 Although Defendants are not seeking to recover all their attorneys’ fees since the filing of
 14 this lawsuit, this fact weighs heavily in favor of a finding of overall bad faith of Radio City and
 15 BHB since the onset of this litigation.

16 **A. Monetary Sanctions Are Necessary to Deter BHB’s Discovery Abuses**

17 BHB’s scorched-earth and bad faith conduct has not only been a pattern in practice in this
 18 lawsuit, but also in other lawsuits.² Not only has Radio City and BHB disregarded discovery rules
 19 and this Court’s Orders (as this Court found in Dkt. 486), they have also continued to fail to comply
 20 with their discovery obligations since Defendants’ February 12, 2023 filing of the motion for
 21 terminating sanctions. For example, on August 24, 2023, during the parties’ regular meet-and-
 22 confer, BHB again refused to scan and provide two additional boxes of documents in the possession
 23 of Radio City, and also further refused to identify the contents thereof despite multiple inquiries
 24 form Defendants since Defendants first learned of the additional two boxes (in addition to the 19

25 _____
 26 ² DPP Counsel’s was disqualified in a prior matter based on similar misconduct in this very district.
 27 See *Gotham City Online, LLC v. Art.com, Inc.*, (N.D. Cal. Case No. C14-00991JSW). Other litigants
 28 in the case of *Jennifer Marino v. YummyEarth Inc.*, (N.D. Cal. Case No. 3:22-cv-02739) have noted
 DPP Counsel’s history of raising “phantom sanctions issues” as part of their “scorched-earth
 practice.”

boxes discovered during the deposition).³ (Izadi Decl. at ¶9). Moreover, BHB has demonstrated their disregard for the Discovery Rules and candor to this Court by failing to quarantine privileged documents pursuant to timely claw back demands, and then representing to the Court inaccurate statements of facts. (Dkt. 404, 405, 407). This Court explicitly found that conduct “unprofessional.” (See 4/25/23 hearing trans. at p. 23 and 26, attached to Izadi Declaration)

B. Defendants Seek Attorneys’ Fees Stemming from Radio City’s Spoliation and Discovery Misconduct Precipitating the Motion for Terminating Sanctions

The record herein, fortified by the corroborative declarations and extant pleadings, compellingly underscores the justice of awarding Defendants in \$311,714.50 in attorneys’ fees, a direct consequence of Radio City’s and BHB’s calculated and egregious acts of bad faith.

BHB, with their manufactured class representative in tow, not only obfuscated the truth but also strategically misled the Defendants and the Court. Despite continuous assurances for over a year, which included vouching for the comprehensiveness of document production, it was subsequently unearthed that such statements were patently false. Radio City’s systematic deception has not just been a grave disservice to the litigation process, but it has inflicted severe prejudice upon the Defendants.

V. DEFENDANTS’ ATTORNEYS’ FEES REQUEST

A. Legal Standard

Three separate grounds support an award of sanctions and reasonable attorneys’ fees in this case. First, this Court expressly authorized Defendants to bring the instant Fee Request to recover reasonable expenses, including attorneys’ fees, incurred in connection with bringing and litigating the motion for termination sanctions pursuant to Rule 37. [Dkt. 486]; *see generally Henry v. Gill Indus., Inc.*, 983 F.2d 943, 946 (9th Cir. 1993) (affirming a district court’s award of attorney fees under Rule 37(d) supported by defendant’s declarations and affidavits, which demonstrated fees were “caused by” plaintiff’s discovery misconduct); *see also Haeger v. Goodyear Tire &*

³ BHB and Radio City would only allow Defendants to travel to their offices in San Francisco to inspect the two boxes. They refused to provide any specificity as to the actual contents of the boxes, or identify what document requests they were responsive to.

1 *Rubber Co.*, 813 F.3d 1233, 1246 (9th Cir. 2016) (awarding monetary sanctions where “Sanctionees
 2 ... adopted a plan of making discovery as difficult as possible, providing only those documents they
 3 wished to provide, timing the production of the small subset of documents they were willing to turn
 4 over such that it was inordinately difficult for Plaintiffs to manage their case, and making false
 5 statements to the Court in an attempt to hide their behavior.”) *rev’d on other grounds* 137 S. Ct.
 6 1178, 1183 (2017). “A primary aspect of that discretion is the ability to fashion an appropriate
 7 sanction for conduct which abuses the judicial process.” *Chambers*, 501 U.S. at 44-45. “

8 Second, BHB’s frivolous and vexatious pursuit of this litigation is subject to sanctions under
 9 28 U.S.C. § 1927, which provides:

10 Any attorney . . . who so multiplies the proceedings in any case unreasonably and
 11 vexatiously may be required by the court to satisfy personally the excess costs,
 12 expenses, and attorneys’ fees reasonably incurred because of such conduct.

13 Sanctions under § 1927 are warranted “when an attorney knowingly or recklessly raises a
 14 frivolous argument or argues a meritorious claim for the purpose of harassing an opponent.” *Trulis*
 15 *v. Barton*, 107 F.3d 685, 692, 694 (9th Cir. 1995) (reversing denial of sanctions under § 1927). Thus,
 16 a finding of recklessness or bad faith is required for an award of sanctions under 28 U.S.C. §
 17 1927. *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1107 (9th Cir. 2002).

18 Because sanctions under § 1927 are authorized only for the unreasonable multiplication of
 19 proceedings, “it applies only to unnecessary filings and tactics once a lawsuit has begun. . . [and]
 20 cannot be applied to an initial pleading.” *In re Keegan Mgmt. Co. Sec. Lit.*, 78 F.3d 431, 435 (9th
 21 Cir. 1996). “Section 1927 is permissive, not mandatory. The court is not obliged to grant
 22 sanctions once it has found unreasonable and vexatious conduct. It may do so in its discretion.”
 23 *Corley v. Rosewood Care Ctr.*, 388 F.3d 990, 1014 (7th Cir. 2004).

24 Sanctions are also appropriate under this Court’s inherent powers. “[R]eckless and knowing
 25 conduct” is “tantamount to bad faith and therefore sanctionable under the court’s inherent power.”
 26 *B.K.B.*, 276 F.3d at 1107-08. Thus, “[s]anctions are available” under the Court’s inherent powers
 27 “for a variety of types of willful actions, including recklessness when combined with an additional
 28

1 factor such as frivolousness, harassment, or an improper purpose.” *Fink v. Gomez*, 239 F.3d 989,
2 994 (9th Cir. 2001)

3 Moreover, attorneys’ fees are independently authorized by 18 U.S.C. § 401, and this Court’s
4 inherent power.

5 **B. Defendants’ Requested Fees and Costs are Reasonable**

6 Defendants’ requested fees and costs are appropriate. The touchstone of an award of
7 attorney’s fees is whether the fee is “reasonable.” *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961
8 (9th Cir. 2006) (amount of sanctions assigned pursuant to a court’s “inherent powers” must be
9 “reasonable”). *See also Mirch v. Frank*, 266 Fed. App’x 586, 588 (9th Cir. Feb. 6 2008)
10 (reasonableness is the “benchmark” for fees pursuant to §1927 sanctions); 28 U.S.C. § 1927
11 (providing for “reasonably incurred” fees). A district court has “broad discretion” in making this
12 determination, *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006), and because it “has the
13 benefit of first-hand contact with the litigation and the lawyers involved,” any resulting award is
14 reviewed “deferentially.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir. 2007).

15 To determine a reasonable amount of attorneys’ fees, courts follow the two-part “lodestar”
16 approach. *See Intel Corp. v. Terabyte Int’l*, 6 F.3d 614, 622 (9th Cir. 1986), *as am. on denial of*
17 *reh’g and reh’g en banc*. The court first calculates the lodestar figure by multiplying the hours
18 reasonably spent on the litigation by a reasonable hourly rate, e.g., one that is “in line with those
19 prevailing in the community for similar services of lawyers of reasonably comparable skill and
20 reputation.” *Blum v. Stenson*, 465 U.S. 886 (1984). Second, the court considers whether to adjust
21 the lodestar figure based on the factors from *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70
22 (9th Cir. 1975), that have not already been subsumed in the initial lodestar calculation. *Morales v.*
23 *City of San Rafael*, 96 F.3d 359, 363-64 & n. 8-10 (9th Cir. 1996).⁴

24 _____
25 ⁴ The *Kerr* factors include “(1) the time and labor required, (2) the novelty and difficulty of the
26 questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of
27 other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether
28 the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8)
the amount involved and the results obtained, (9) the experience, reputation, and ability of the
attorneys, (10) the ‘undesirability’ of the case, (11) the nature and length of the professional
relationship with the client, and (12) awards in similar cases.” *Kerr*, 526 F.2d at 70.

Courts in this district apply the lodestar method for calculating reasonable attorneys' fees which is based on the reasonableness of both the time spent and the hourly rate. *Graham v. Daimler Chrysler Corp.*, 34 Cal.4th 553, 579 (2004). The lodestar is considered "the basic fee for comparable services in the community" (*see id.*), and under California law, may be adjusted by the court based on several factors. *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001). These factors include "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." *Ibid*; *Dixon v. City of Oakland*, 2014 WL 6951260, at *3 (N.D. Cal. 2014).

C. Defendants' Lawyers Spent a Reasonable, Necessary and Well-Documented Amount of Hours on this Case

In the course of litigating this case since June 1, 2020, Defendants have incurred more than \$4,000,000.00 in attorneys' fees, and more than \$1,500,000 since November of 2022 through the present. The law supports shifting all of these fees, as well as fees incurred earlier in this case, in light of Radio City's and BHB's extraordinary misconduct. *See, e.g., Chambers*, 501 U.S. at 56-57 (where district court found that defendant's actions were "part of [a] sordid scheme of deliberate misuse of the judicial process designed to defeat [plaintiff's] claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources," it was "within the court's discretion to vindicate itself and compensate [plaintiff] by requiring [defendant] to pay for *all* attorney's fees.") (emphasis added).

Nevertheless, Defendants seek only a fragment of those fees, which are specifically attributable to the following tasks:: (1) Preparing the Motion for Terminating Sanctions[Dkt 322], (2) Preparing the Reply [Dkt 349]; (3) Preparing the Motion to Strike the Declaration of Groves [Dkt. 372]; (4) Reviewing and Opposing Supplemental Opposition filed by Radio City [Dkt. 385]; (5) Preparing and attending the April 6 hearing on the motion for terminating sanctions; (6) Preparing the Motion for Turnover Order and Motion for Sanctions [Dkt. 325]; (7) Preparing the joint letter brief re customer information [Dkt. 294]; (8) Preparing the joint letter brief re document

collection efforts [Dkt. 298]; (9) Preparing the joint letter brief re deposition notice of Radio City relating to collection of documents [Dkt. 305] and (10) Preparing for and attending the deposition of Maline Fish. All of the fees incurred in connection with those tasks are directly related to, and were caused by, Radio City and BHB's egregious misconduct.

Defendants have separated out their time associated with the respective tasks that were caused by Radio City and BHB's bad faith, which is set forth below and supported by the accompanying declarations of Christopher Frost and Shauna Izadi. The amount attributable to those tasks are set forth below:

Task	Amount
Preparing the Motion for Terminating Sanctions [Dkt 322]	\$107,646.50
Preparing the Reply ISO Terminating Sanctions [Dkt 349]	\$77,846.00
Preparing the Motion to Strike the Declaration of Groves [Dkt 372]	\$8,649.00
Reviewing and Opposing Supplemental Opposition filed by Radio City [Dkt. 385]	\$2,640.00
Preparing and attending the April 6 hearing	\$10,019.00
Preparation of the Motion for Turnover Order and Motion for Sanctions [Dkt 325];	\$19,000.50
Preparation of the joint letter brief re customer information [Dkt. 294];	\$22,335.00
Preparation of the joint letter brief re document collection efforts [Dkt. 298]	\$10,980.00
Preparation of joint letter brief re deposition notice of Radio City relating to collection of documents [Dkt. 305]	\$3,960.00
Preparation and attendance of the deposition of Maline Fish (2/1/2023)	\$48,638.50

(See Frost Decl. at ¶7; see also Izadi Decl.)

Defendants' attorneys have exercised "billing judgment" by submitting detailed, contemporaneous documentation of the hours that they expended in litigation this case, and have excluded any "excessive, redundant, or otherwise unnecessary hours" from its calculations. See *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983). The resulting number of hours are reasonable in the context and nature of this litigation and plaintiffs' misconduct since at least 2021, and the

1 amount at stake in this action.

2 First, Defendants’ attorneys’ hours are reasonable because litigating this case in the face of
 3 Radio City’s and BHB’s misconduct required an enormous amount of time and labor. *See Kim v.*
 4 *Fujikawa*, 871 F.2d 1427, 1435 (9th Cir. 1989) (affirming district court’s lodestar fee findings
 5 because “complexity of the facts and the law” made hours reasonable). Defendants’ misconduct
 6 permeated this already complex action from at least October of 2022 when Radio City and BHB
 7 continued to represent that they had produced “everything.” Defendants served at least five meet-
 8 and-confer letters concerning the deficiencies and gaps in Plaintiffs’ discovery [Dkt. 486 at p. 3].
 9 Rather than BHB checking into any of the gaps, BHB blindly stated they were in full discovery
 10 compliance. Radio City not only aggressively litigated all discovery disputes as to their gaps, but
 11 they did so in a manner that required Defendants to simultaneously investigate and refute these
 12 forms of obfuscation. *See Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir. 1987) (affirming
 13 lodestar fee amount that “may [have] appear[ed] to be high” because of “complex issues” involved);
 14 *In re Grivas*, 105 B.R. 954, 963 (Bankr. S.D. Cal. 1989) (rejecting objections to special litigation
 15 counsel fees’ by noting that the reasonableness of fees “cannot be examined in the abstract” and that
 16 fees were a reaction to “aggressive and vigorous litigation” by the complaining party). Given these
 17 extraordinary circumstances, the amount claimed by Defendants is reasonable. The reasonableness
 18 of Defendants’ fees are also confirmed by the high stakes of this litigation.

19 **D. Defendants’ Counsel’s Hourly Rates are Reasonable**

20 The determination of whether hourly rates are reasonable is based upon the prevailing market
 21 rates in the relevant community, *Blum v. Stenson*, 465 U.S. 886, 895 (1984), where the relevant
 22 market is the forum in which the district court sits, and the prevailing rate is the rate prevailing in
 23 the community for “similar work performed by attorneys of comparable skill, experience, and
 24 reputation.” *Barjon v. Dalton*, 132 F.3d 496, 500-02 (9th Cir. 1997); *see Van Gerwen v. Guarantee*
 25 *Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (“Quality of representation is generally
 26 considered at the lodestar stage in determining what is a reasonable hourly rate.”). Under these
 27 standards, and as many courts have recognized, Frost, Weinberg Gonser Frost, the firm at which
 28

Defendants' attorneys were previously associated with ("WGF"), and Izadi Legal's rates are well within reasonable bounds. (See Frost Decl. at ¶¶ 9-17; see also Izadi Decl. at ¶¶ 2-4).

E. The Amount of Fees Sought by Defendants is Reasonable

In order to prepare the original motion for terminating sanctions [Dkt. 322], the reply brief [Dkt. 349], and analyzing the supplemental brief filed by the DPPs, Defendants' counsel, Shauna Izadi, conducted 96.8 hours of legal work on the motion for terminating sanctions and litigation thereof, as set forth in detail in the Declaration of Shauna Izadi, filed herewith. (Izadi Decl.). Similarly, associate Weixuan Cai, also conducted 56.4 hours of legal work in connection with the filing and litigation of the motion for terminating sanctions. As set forth in the accompanying declarations, such time was warranted and necessary in light of the years of litigation preceding this motion, and the opposition of Radio City, which required substantial analysis of thousands of Bate-stamped references to refute Radio City's claim that the destroyed evidence was duplicative of other produced data. (Izadi Decl. at ¶ 7; Frost Decl. at ¶ 23;). As set forth in the accompanying declarations, lead counsel, Christopher Frost, who took the deposition of Maline Fish, uncovered the years of concealment of hidden data and documents as well as the destruction of key sales and customer data, spent 115.4 hours on the motion for terminating sanctions. (Frost Dec. at ¶ 19).

The total 379.6 hours spent on the Motion, the Reply, the response to Plaintiffs' supplemental declaration (Dkts. 322, 349), and the preparation and attendance of the hearing on the motion, is consistent with those awarded in California District Courts, especially in light of its complexity, sophistication and detail. (See Frost Decl); see, e.g., *Nguyen v. Regents of the Univ. of Cal.*, No. 8:17-cv-00423-JVS-KESx, 2018 U.S. Dist. LEXIS 226622, at *10–11 (C.D. Cal. May 18, 2018) [approving 36.1 hours for the preparation of a joint stipulation]; *Dish Network L.L.C. v. Jadoo TV, Inc.*, No. 2:18-cv-9768-FMO (KSx), 2019 U.S. Dist. LEXIS 221869, at *18 (C.D. Cal. Nov. 8, 2019). Accordingly, the time spent by Defendants' counsel preparing the original motion for terminating sanctions is reasonable.

Similarly, the detailed compilations to the Frost and Izadi Declarations set forth the reasonableness and necessity of the preparation and attendance of the deposition of Maline Fish, the

1 preparation of the motion for turnover order, the multiple joint discovery dispute letter briefs, and
 2 the motion to strike Groves' declaration. (*See* Frost Decl.; *see also* Izadi Decl.).

3 The total fees incurred as a result of Radio City's and its counsel's misconduct is
 4 \$311,714.50. Therefore, Defendants respectfully request that the Court order sanctions against
 5 Radio City and its counsel, jointly and severally, in the amount of \$311,714.50. This amount reflects
 6 the reasonable attorneys' fees and expenses all arising and relating to the discovery issues with
 7 Radio City. Defendants would never have incurred these fees and costs but for the bad faith of
 8 Radio City and its counsel and the inexcusable and disturbing conduct outlined herein.

9
 10 DATED: September 22, 2023

FROST LLP

11
 12 By:



13 CHRISTOPHER FROST

JOSHUA STAMBAUG

14 JOHN MAATTA

15 Attorney for Defendants, Synta Technology Corp.
 16 of Taiwan; Suzhou Synta Optical Technology Co.;
 17 Nantong Schmidt Opt-Electrical Technology Co.
 18 Ltd.; Synta Canada International Enterprises Ltd.;
 19 Pacific Telescope Corp.; Olivon Manufacturing
 20 Co. Ltd.; SW Technology Corp.; Celestron
 21 Acquisition, LLC; Olivon USA LLC; David Shen;
 22 Joseph Lupica; and David Anderson